**Office of Chief Counsel**
**Internal Revenue Service**

# memorandum

CC:NER:NED:BOS:TL-N-679-00
MJGormley

**date:**

**to:** Chief, Examination Division, New England District
Attn: Rich Tierney, Acting Group Manager; Cathy Grant, Group Manager

**from:** District Counsel, New England District, Boston

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**subject:** [redacted]
Request for Reconsideration

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FACTS

This memorandum is being written in response to your request for reconsideration of an advisory opinion issued by our office on August 31, 1999. In that earlier opinion, we found that a Form 870 was effective upon delivery to the Internal Revenue Service and could be immediately assessed. In reaching that conclusion, we relied on the following facts. On [redacted], [redacted] and [redacted] entered into an agreement whereby [redacted] assumed certain deposit liabilities of

the [redacted] of [redacted] in consideration for certain payments from [redacted] to [redacted] and the transfer of certain assets to [redacted]. The taxpayer calculated the market value of acquired deposits and allocated a percentage to a covenant-not-to compete and the remainder to goodwill. The transaction was consummated [redacted]. During the audit, the agent disallowed the covenant allocation on the basis of lack of economic reality but tentatively agreed with the taxpayer's allocation of [redacted]% of the purchase price to core deposits if a settlement agreement could be reached on the other issues.

The parties reached a verbal agreement which resulted in an item adjustment of $[redacted] for [redacted]. Because of a large refund due to the taxpayer for [redacted], the case was sent to Joint Committee in [redacted]. In [redacted], the Joint Committee returned the case to the agent for consideration of a savings bank life insurance issue (SBLI). The SBLI issue originally involved [redacted], [redacted] and [redacted]. The agent later expanded his examination to include [redacted], [redacted] and [redacted]. The taxpayer was initially willing to agree to the SBLI adjustment, along with other adjustments, if an intangibles settlement initiative package was made available to them.

The taxpayer had executed a Form 870, Waiver of Assessments and Payments on [redacted], for the years [redacted] through [redacted], agreeing to an allocation of the purchase premium between core deposits, fixed assets, a non-compete agreement and goodwill. Following return of the case from the Joint Committee for consideration of the SBLI issue, the taxpayer requested the intangibles settlement initiative. The agent took the position that the taxpayer should not be entitled to the settlement because of the previous "agreement", the Form 870. However, the taxpayer claimed the waiver was not effective to preclude the availability of the settlement initiative. It appears the taxpayer may have argued that the Form 870 was not valid because the waiver was never accepted by the government.

We were provided with a Form 870 dated [redacted], signed by the taxpayer, consenting to the immediate assessment and collection of any deficiencies for the tax years ended [redacted], [redacted], [redacted] and [redacted]. The Form 870 was a unilateral waiver and did not contain a place for signatures indicating acceptance on behalf of the government. If the adjustments in the 870 forwarded to this office on [redacted] were assessed, the taxpayer would have had deficiencies in fiscal year [redacted] of $[redacted], the calendar year [redacted] of $[redacted] and an overassessment in [redacted] of $[redacted], and no deficiency and no overpayment in [redacted]. The adjustments listed in the Form 870 did not include any adjustments or agreement as

to the SBLI issue or the global settlement initiative.

As noted, the waiver, the Form 870, was signed by the taxpayer in [redacted]. At that time the taxpayer and the government had reached a verbal settlement agreement as to disposition of the issues. However, no assessments were made and a closing agreement was never executed. The case was later returned from Joint Committee in [redacted] and it was at this point that the government raised a new issue with the taxpayer, the SBLI issue. In response, the taxpayer requested the intangible settlement initiative package. This is still the current status of the case. No assessments have been made and no closing agreements have been executed.

In our opinion dated August 31, 1999, we determined that the Form 870 was effective upon delivery to the Service and could be immediately assessed. As noted, no assessments have been made. We then went on to review the issue of the intangible settlement initiative. We noted that I.R.C. § 197 provides for the amortization of acquired intangibles, including goodwill and going concern value, and is effective for intangibles acquired after August 10, 1993. I.R.C. § 197 would not apply in this case because the intangibles were acquired on [redacted]. Similarly, a limited election provided by Congress for intangibles acquired after July 25, 1991 is also inapplicable. The only alternative potentially available to the taxpayer would be the intangible settlement initiative.

On February 9, 1994, the Internal Revenue Service, by IRS Release IR-94-9, adopted a settlement approach for the majority of cases pending involving intangible issues. The release stated the initiative would be available to all taxpayers with two limited exceptions:

(1) No initiative would be extended in specific cases where a decision not to extend such was made after review by a National Office cross-functional committee consisting of three branches of the Service; and
(2) The issues relate to acquisitions made after July 25, 1991.

The first exception, subparagraph (1) above, does not apply in this case. The second exception, subparagraph (2) is also inapplicable. As noted, these intangibles were acquired [redacted].

As noted, in our first advisory opinion, we concluded that the Form 870 was effective upon delivery to the Service and could be immediately assessed. With regard to the settlement

initiative, we advised that due to the effectiveness of the Form 870, the settlement was not available to the taxpayer. The National Office pre-reviewed our opinion and concluded that the Form 870 was a unilateral waiver which did not require acceptance to take effect. The National Office also agreed with our opinion that I.R.C. § 197 was not retroactive. However, it was noted that this was not the primary reason why the taxpayer was not entitled to the intangible settlement initiative. Rather, the effectiveness of the Form 870 was found to resolve the intangible amortization issue and eliminate the applicability of the later created settlement initiative.

In your request for reconsideration, you have disclosed certain pre-existing facts to this office for the first time. When the Form 870, the Waiver of Restrictions on Assessment and Collection, was originally sent to the taxpayer, it contained information reflecting adjustments to tax and penalties for the tax years ended [redacted], [redacted] and [redacted]. It did not contain any information relating to adjustments for the tax year ended [redacted]. The taxpayer executed the Form 870 for the three years just described, and returned the waiver to the agent. Upon receipt of the waiver, the agent realized he had forgotten to include the tax year ended [redacted] on the waiver. The adjustment for this year was in fact [redacted] as a result of NOL carrybacks from the earlier years. The agent made a decision to alter the executed waiver and added the [redacted] years to the Form 870. The agent never informed the taxpayer about this alteration. When this office requested a copy of the Form 870 in [redacted], the agent forwarded the altered Form 870 to us without explanation. We were not aware at the time we rendered our prior opinion that any changes or alterations had been made to the waiver without the taxpayer's knowledge or consent.

## LEGAL ANALYSIS

Initially, a distinction must be drawn between a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, and a Form 906, Closing Agreement. A properly executed Form 870 permits the IRS to assess and collect tax due without sending the taxpayer a notice of deficiency. See Philadelphia & Reading Corporation v. US, 944 F.2d 1063 (3rd Cir. 1991). Pursuant to I.R.C. § 6213(d), an executed Form 870 effects a waiver of the I.R.C. §6213(a) restriction on assessment and collection of a deficiency. When an executed 870 is delivered to the IRS, the Service may immediately assess the taxpayer for the taxable year of the deficiency. If notice and demand for payment are not made within 30 days after the filing of the Form 870, the waiver stops the running of interest on the deficiency until notice and demand for

payment are made. I.R.C. § 6601(c). The taxpayer may, after payment of the tax, still file a claim for refund and, if the refund claim is denied, or if the Commissioner fails to take action on the claim within six months, litigate the merits of his tax liability in District Court or Claims Court. See Smith v. Commissioner, T.C. Memo 1991-412.

Alternatively, under I.R.C. § 7121, a taxpayer may enter into an agreement with the Service relating to the taxpayer's liability for any internal revenue tax for any period and, such a closing agreement shall be final and conclusive in the absence of fraud, malfeasance, or misrepresentation of a material fact. The Commissioner and his delegates have the authority to enter into such closing agreements. Execution of a Form 906 closing agreement by or on behalf of the taxpayer results in an offer to agree. Rev. Proc. 68-16, sec. 6.07, 1968-1 C.B. 770,780. Execution on behalf of the Commissioner constitutes acceptance of the taxpayer's offer. An executed Form 870, however, is not a closing agreement under I.R.C. § 7121. Smith, supra T.C. Memo 1991-412 citing C.H.Leavell & Co. v. Commissioner, 53 T.C. 426, 438-439 (1969); Dolan v. Commissioner, 44 T.C. 420, 432 (1965).

In addition to the distinction to be drawn between a waiver and a closing agreement, we also have to consider the impact of the agent's alteration of the Form 870 subsequent to the execution of the waiver by the taxpayer. If a written executory contract has been materially altered from its original condition when signed and delivered, the alteration renders the instrument void and prevents the party making the change from using it as a basis for recovery, either in the altered form or in its original condition. See Mappa v. Moine, 1998 U.S. Dist. LEXIS 15778 (USDC No. Dist. IL 1998) citing Renaissance Restaurant & Lounge, Inc. v. Gavrilos, 197 Ill. Dec. 269 (Ill.App.2d 1990) citing Cities Service Oil Co. v. Viering, 404 Ill. 538, 89 N.E.2d 392, 398 (Ill. 1949). However, the Supreme Court has held that waivers are not contracts, but rather a voluntary, unilateral waiver of a defense or right by a taxpayer. Florsheim Bros. Drygoods Co. v. U.S., 280 U.S. 453 (1930); Stange v. U.S., 282 U.S. 270 (1931). While courts, in limited contexts, have utilized contract analysis to resolve problems related to waivers, a waiver has never been held to be a contract. See U.S. v. McGaughey, Jr., 977 F.2d 1067, 1072 (7th Cir. 1992).

In the case of consents, consents to extend the period of limitations for assessment are generally considered unilateral waivers and not contracts. Monti v. Commissioner, T.C. Memo 1995-73, citing Stange v. U.S., supra 282 U.S. 270; Woods v. Commissioner, 92 T.C. 776,780 (1989); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). Contract principles have been found

to be important, however, because I.R.C. § 6501(c)(4) requires the taxpayer and the Commissioner enter into a written contract or agreement to extend the statute. The Forms 872 and 872-A that are utilized for this purpose, however, differ from the type of waiver involved in our case in that the Forms 872 and 872-A require the signatures of both the taxpayer and the Commissioner. The Form 870 requires only the signature of the taxpayer.

In the Monti case, the Tax Court held that if the respondent, after a consent form has been signed by the taxpayer and without obtaining authorization from the taxpayer, alters a consent form, and if such alteration materially alters the terms of the intended agreement, such a consent form will generally not be recognized and will not be effective to extend the period of limitations. T.C. Memo 1995-73. See also Piarulle v. Commissioner, supra, 80 T.C. at 1043; Cary v. Commissioner, 48 T.C. 754,766 (1967); Cannon v. Commissioner, T.C. Memo 1990-410. The Monti Court went on to hold, however, that such an alteration by respondent would not invalidate the consent if, subsequent to the taxpayer's signing the consent form, the taxpayer plainly and unambiguously consents to the alteration. Cary v. Commissioner, supra 48 T.C. at 761-762. Additionally, when respondent's alteration of a consent form does not alter the agreement of the parties but only corrects a scrivener's mistake in the consent form, the Court may reform the consent form to conform it to the actual intent and agreement of the parties. Woods v. Commissioner, 92 T.C. 776, 782-783.

In considering all the facts and circumstances surrounding the execution of altered consents, the Tax Court has reviewed other evidence and documents such as cover letters submitted with the consent, in order to determine the taxpayer's intent. See Bellis v. Commissioner, T.C. Memo 1994-28, citing Windfall Grain Co. Commissioner, 23 B.T.A. 725 (1931); Smith v. Commissioner, T.C. Memo 1989-87. Extraneous evidence that could be considered in this case includes the Statement of Income Tax Changes, the Revenue Agent's Report and other notes in the administrative file.

In this case, it is clear the waiver itself is not a contract. However, contract principles can be applied in order to analyze the impact of the agent's unilateral modification of the Form 870. Applying the principles of the Monti case, an argument can be made that the alteration made by the agent was not material. T.C. Memo 1995-73. The year added to the face of the Form 870, [redacted], was a no change year. The [redacted] year had been part of the discussions between the taxpayer and the agent, and the carrybacks from the [redacted] year generated a part of the overall refund. Given these facts, a Court might find that the

taxpayer's consent could be implied from all of the surrounding facts and circumstances. Moreover, the agent's addition of the [redacted] year to the face of the Form 870 could be construed as the act of correcting a mistake or oversight. This argument is supported by other extraneous evidence including the agent's report, his notes and the statement of income tax changes. See Bellis v. Commissioner, T.C. memo 1994-28; Smith v. Commissioner, T.C. Memo 1989-87.

Alternatively, we must also consider the significance of the agent's actions, exclusive of the specific adjustments to be made in the [redacted] year. For example, if the [redacted] year was a year in which an increase in tax was being proposed, it is unlikely that a Court would view the agent's modification as anything other than a material alteration of the document. Moreover, the taxpayer has only recently become aware of the addition to the Form 870. While the taxpayer has not objected to the addition of the [redacted] year to terms of the waiver, it is our understanding that the taxpayer has indicated it will agree to the Form 870 as modified if it is able to benefit from the settlement initiative package. This does not support the argument that the taxpayer impliedly consents to the alteration.

In any event, we conclude that the issue of the validity of the Form 870, as to the [redacted] year, need not be resolved in order to address the issue posed in your request for reconsideration: Whether the intangible settlement initiative package is available to the taxpayer for certain intangibles acquired on [redacted]. Although neither I.R.C. § 197 nor the limited election provided for intangibles acquired after July 25, 1991 is applicable, as previously noted the assets acquired by the taxpayer do qualify for the intangible settlement initiative outlined in IRS Release IR-94-9. This result is unaffected by the validity or invalidity of the Form 870. As discussed herein above, the Form 870 is a unilateral waiver and does not have the effect of a closing agreement. In addition, no action has been taken by the IRS in reliance on the waiver; no assessments have been made and no collection activity has been initiated. moreover, the case was never resubmitted to the joint committee for approval of the overassessment, and as such, the case and all of the issues remain open.

## CONCLUSION

Based on all of the above, we recommend the following action be taken. The intangible settlement initiative outlined in IR-94-9 should be made available to the taxpayer, all remaining issues including the SBLI issue should be resolved, the case should be resubmitted to the joint committee, and a new Form 870 for the

[redacted] year should be obtained from the taxpayer. The unaltered Form 870 for the periods ended [redacted], [redacted] and [redacted] is still in effect for those tax periods.

If you need further assistance in this matter, please contact Michele J. Gormley at 617/565-7858.

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By: _____
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